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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 89

ALTON J. LEMON, *et al.*,

Appellants,

v.

DAVID H. KURTZMAN, as Superintendent of Public Instruction of the Commonwealth of Pennsylvania, *et al.*,

Appellees.

BRIEF FOR THE NATIONAL CATHOLIC EDUCATIONAL ASSOCIATION, THE NATIONAL ASSOCIATION OF EPISCOPAL SCHOOLS, THE NATIONAL UNION OF CHRISTIAN SCHOOLS, THE NATIONAL CONFERENCE OF YESHIVA PRINCIPALS, AND THE LUTHERAN EDUCATION ASSOCIATION, AMICI CURIAE

INTRODUCTORY STATEMENT

The relevant facts, the statute involved, the applicable provisions of the First and Fourteenth Amendments, the questions presented on the appeal and the opinion of the court below are all set out in the respective briefs and appendices filed by the opposing parties.[1] These *amici* accept them for purposes of their own brief. Appellants and appellees have given their written consents to the submission of this *amici curiae* brief.

[1]The opinion of the three-judge court is officially reported in 310 F.Supp. 35 (E.D. Pa., 1969).

INTERESTS OF THE AMICI CURIAE AND THEIR POSITION ON THE ISSUES

A. *Identification of the Amici.* The five *amici curiae* in whose behalf this brief is submitted are nonprofit educational associations. They represent some 6,000,000 children enrolled in more than 14,000 schools which are served by nearly 250,000 teachers and staff. All five associations are dedicated to fostering and protecting the principles and ideals of American education, improving the quality of that education and preserving its accessibility to and influence on the youth of the Nation.

The National Catholic Educational Association (NCEA) is a voluntary organization founded in 1904. It is the oldest and largest professional organization of Catholic educators in the United States. NCEA serves 5,500,000 students, 206,000 educators and over 14,000 institutions, at all levels and in all areas of Catholic education. NCEA is governed by a Board of Directors, six of the members of which are elected by a Body of Delegates, composed of 15 representatives of each of the six existing departments of NCEA. The Delegates also elect the officers of the organization. Nine members of the Board of Directors are elected by the two present divisions of NCEA, that of Higher Education and that of Fundamental Education.

The National Association of Episcopal Schools is a nonprofit organization chartered in the State of New York. Membership in the Association is voluntary. Member schools are Episcopal schools owned or operated by, or under the jurisdiction of, a cathedral, dioceses, religious community or other recognized Episcopal organizations. Associate membership may be granted to schools which are not church-related but sympathetic to the aims and purposes of the Association.

The National Union of Christian Schools (NUCS) is a nonprofit educational association chartered in Michigan. It has been in existence for more than half a century. Almost

300 schools located in 26 states, as well as in Canada and Mexico, are affiliated with NUCS. Forty-two of the schools are high schools. Over 60,000 pupils attend schools affiliated with NUCS, and the total number of teachers and administrators on the staffs of these schools exceeds 2,700. Schools affiliated with NUCS are owned by associations of parents. They are operated on the principle that the parents have a primary responsibility for the education of their children.

The National Conference of Yeshiva Principals is the only national professional organization of principals of Yeshiva Hebrew day schools in the United States. The Conference is made up of the principals of 405 schools in 165 communities located in 30 states. These schools have an enrollment of some 80,000 students. The Conference is governed by a Board of Directors consisting of 18 members who are elected biannually at the national convention of the Conference.

The Lutheran Education Association (LEA), a voluntary organization, was founded 27 years ago to support Christian education and to serve the Christian educator. LEA is the only professional organization for educators in the Lutheran elementary and secondary schools. LEA serves 174,931 students, 1,271 institutions, and 7,704 educators in 43 states. The active membership of LEA numbers 2,714 and is composed of ministers of education, pastors and laymen. The Association is governed by nine board members, seven of these are elected by the total membership and two are on the board as representatives of specialized departments—directors of Christian education and principals of Lutheran elementary schools.

B. *The Concern of the Amici and Their Position on the Issues Raised.* The *amici* are aware that it is their association with their respective religious organizations which lies at the heart of appellants' challenge to the eligibility of nearly 550,000 school children attending nonpublic schools in Pennsylvania to benefit from the program enacted by the

State of Pennsylvania for the common welfare of the entire State by purchasing limited secular educational services performed in such schools, as provided for in the Pennsylvania Non-Public Elementary and Secondary School Act of 1968.[2]

The schools which these Pennsylvania school children attend are of the type represented by the *amici*. Appellants would have the Court accept the false notion that such schools are merely a type of Sunday School, primarily teaching religion, or at best, are mere catechetical instruments of various religious denominations with their secular education functions serving as a thin disguise for missionary or apostolic purposes. It is the interest of these *amici* first to defend themselves and the students who attend their schools against this erroneous constitutional caricature.

Secondly, and of equal imperativeness, they wish to report to the Court the national concern, experienced not only in Pennsylvania but throughout a majority of the States, over the continuing curtailment in the secular educational services offered by nonpublic schools due to the declining financial circumstances in which a great many of the nonpublic elementary and secondary schools now find themselves. This decline, in turn, is caused by the rapidly rising costs of education and the inability of such schools to obtain exclusively from private sources the amount of operating funds required if they are to continue to serve the public as an essential part of the American community of schools.

In pursuing these objectives the *amici* see no need to belabor two fundamental and extremely relevant propositions of ultimate fact made by the appellees in this case and previously accepted and applied by the Court, most recently in *Board of Education v. Allen*, 392 U.S. 236 (1968). These are: (1) that religious-related schools of the type for whom these *amici* speak "play a significant and valuable role in raising national levels of knowledge, compe-

[2]Act of June 19, 1968, No. 109; 24 P.S. (Purdon), Sec. 5601, *et seq.*

tence and experience"; and (2) that such "schools are performing, in addition to their sectarian function, the task of secular education." 392 U.S., at 247.[3]

It is to the relief of the pressing problem of preserving the quality secular educational services the private schools carry on that the legislatures of a number of States, including Pennsylvania, have recently addressed themselves. Various statutory programs have been proposed, and some enacted, for the purpose of assisting nonpublic secular education, including the nonpublic secular education offered at the religious-related school.[4] These programs are aimed at preserving and improving secular education, not at aiding churches or establishing religions. This case involves the constitutionality of one such program, that adopted by Pennsylvania. There, limited assistance to nonpublic secular education is provided through agreements for the purchase of secular educational services entered into between the schools and the State.

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[3]Recent reliable studies, The Catholic Schools in Action (conducted by the University of Notre Dame) and The Education of Catholic Americans (conducted by the National Statistical Research Center of the University of Chicago), fairly report the grade or quality of the "secular education" provided by nonpublic religious schools "to their students." 392 U.S. at 247. For example, these studies show that over 80% of the students in Catholic elementary and secondary schools achieved "scores at or above the national norms." Moreover, both studies also concluded that the education offered at such schools also compiled impressive records in educating their students in other crucial areas, such as citizenship, moral and spiritual values, family relationships, parental involvement and post-school activities and achievements. There is every reason to believe that similar impressive secular educational achievements also obtain for the nonpublic schools affiliated with other religious denominations. In all respects, then, it would appear that the performance of the religious-related nonpublic schools justifies the observations of Mr. Justice White, speaking for the Court in the *Allen* case, concerning the quality of the secular education offered and received in such schools. 392 U.S., at 247-48.

[4]See note 15 *infra*.

It is the position of these *amici* that: (1) the financial problems of the nonpublic school are public problems about which the Pennsylvania legislature, and those in other States, are legitimately concerned; (2) the Pennsylvania statute represents an effective and constitutional coordination of parental and State rights; (3) the statutory program of limited state assistance to secular educational services performed by the private schools is an enhancement of academic freedom which comports fully with our constitutional and academic traditions; and (4) the purpose and primary effect of the Act are the assisting of secular activities, not religious activities; and the Act does not involve any "excessive governmental entanglement" in religion or religious activities.

THE BASIC QUESTION PRESENTED

The appellants attempt to present a number of questions for the Court to decide in this case. Some of these issues relate to the standing to sue on the part of several of the appellants. Another question deals with whether the court below properly dismissed the complaint for failure to state a claim upon which relief could be granted. On the substantive side, appellants would have the Court determine questions of equal protection and free exercise, as well as resolve the establishment issue. It is solely the last issue which appears to these *amici* to be determinative, at least so far as their own precise interests as private educators are concerned.[5]

However, the *amici* are aware that an Equal Protection Clause issue has been raised in this case. As educators,

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[5]Moreover, the other issues, both jurisdictional and substantive, are adequately treated in the briefs filed by the appellees. These *amici* concur in their exposition by the appellees.

amici are convinced that enforced segregation is an academic evil. *Amici* neither encourage nor tolerate such segregation in their member schools. Any school that is *de jure* segregated should be ineligible for government funds. Schools that are *de facto* segregated should, as a condition of eligibility for governmental assistance, make good faith efforts to remedy the situation and, where their own financial resources do not suffice, should receive governmental assistance for this purpose.

As these *amici* see it, the basic issue which the Court is asked to decide on the merits is whether the Pennsylvania statute which authorizes the State to purchase certain limited secular educational services performed in Pennsylvania's nonpublic schools—schools which comply with the state compulsory attendance law—violates the Establishment of Religion Clause of the First Amendment, as made applicable to the States through the Fourteenth Amendment to the Constitution of the United States. For the reasons they now state, the *amici* believe that that question should be answered in the negative and that the decision of the court below on this issue should be affirmed.

SUMMARY OF ARGUMENT

I.

The continuing and intensifying financial crisis which now afflicts private education in this Country raises serious doubts as to whether the nonpublic schools can continue doing their "acceptable job of providing secular education to their students." 392 U.S., at 247. Left unattended, the financial predicament of the nonpublic schools will generate a *public* educational crisis. If Pennsylvania does not provide some financial assistance to help keep nonpublic schools functioning at quality secular levels, Pennsylvania will have to provide—at enormously greater cost—public schools for most of the children now in church-related schools.

More, however, than money is at issue. If Pennsylvania does not channel its educational benefits through public and nonpublic institutions in a time of rapidly increasing costs, Pennsylvania will not reap the benefits of a pluralistic educational structure in a pluralistic society.

The expanding dimensions of the serious financial crisis which confronts the private, religious-related schools are attributable to causes that are not difficult to identify. Moreover, the inflationary rise in the costs of education have special manifestations in the private school sector, especially in respect to the religious-related private schools. Together, these causes have produced a significant decline in the number of religious-related private schools, especially on the elementary school level.

The administrators of the nonpublic schools, supported by a strong, continuous demand throughout the Country for the preservation of these schools, have employed many measures in an effort to deal with their burgeoning budgets. Despite these efforts, the financial crisis of the nonpublic schools, and especially that of the religious-related schools, continues unabated. It is that pressing public problem at which the Pennsylvania Act is directed. The justifiable concern of the public's legislative representatives in ameliorating the public dimensions of the problem is not open to argument.

II.

The Pennsylvania statute is in obvious harmony with the basic propositions of constitutional law which this Court has established in the field of child education. The Act effectively coordinates parental and State rights in the secular education of school children. State standards of secular academic exposure and achievement are set; State funds are provided to meet part of the cost of secular education; and parents are free to select either public schools or private schools for the education of their children.

The appellants, and their supporting *amici*, urge the destruction of this coordination of parental and State rights by asking the Court to hold that the exercise of a parent's constitutional right to send his child to a secularly qualified religious-related school forfeits another constitutional right he possesses, *i.e.*, participation in general benefits of a secular character which the State has decided to accord its citizens. Such a doctrine of forfeiture is without foundation in our constitutional and academic traditions.

These *amici* do not argue that Pennsylvania, or any other State, is under a constitutional obligation to enact a statute of the type before the Court. They argue only that Pennsylvania has the right to do so in order to achieve its goals of high quality secular education for all school children and in order to achieve more effective coordination of parental and state rights in the secular education of school children.

Since World War II, with the tremendous demand for equalization and improvement of secular educational opportunities, the Federal and many State governments have embarked upon a policy of providing secular educational assistance for all children in secularly qualified schools. There is nothing in American constitutional law that requires States to channel all their educational programs through public schools. Both States and parents are entitled to something better than an "all or nothing" choice.

III.

Moreover, the Pennsylvania program lends strong support to one of the most fundamental values in American constitutional law: the free exchange of ideas in the marketplace, and especially in the academic marketplace. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton v. Tucker*, 364 U.S., at 487. "The classroom is peculiarly the 'marketplace of ideas'." *Keyishian v. Board of Regents*, 385 U.S., at 603.

This Court long ago recognized the critical role that the nonpublic schools of America play in the preservation and development of academic freedom. When, in 1925, Oregon would have destroyed the nonpublic school system in that State, this Court unanimously affirmed the importance of educational diversity in this country. There can be no true freedom where there is no real diversity.

Without nonpublic schools, and without quality secular education in those schools, the Nation would be enormously poorer in its educational resources and therefore in the dynamism of its marketplace of truth. Public schools make an enormous and indispensable contribution to the Nation, but in recent years it has become apparent that many public public school systems suffer seriously from political pressures and bureaucracy. Moreover, the Constitution imposes a severe limitation upon the capacity of the public schools to deal with the central religious values of human life.

Nonpublic schools, with their greater capacity for innovation and experimentation, and with their freedom to explore the intellectual and moral dimensions of religion, provide an indispensable supplement to public institutions. Together with public institutions, they form the "American community of schools." By providing carefully limited assistance to preserve and improve secular education in nonpublic schools, the Pennsylvania statute has not only avoided any establishment of religion; it has actually enhanced academic freedom in America.

IV.

The appellants and their supporting *amici* read this Court's decision in *Walz v. Tax Commission*, 397 U.S. 664 (1970), to have displaced the secular purpose and primary effect test which this Court first enunciated in *Abington School District v. Schempp*, 374 U.S. 203, 222 (1963), and first applied in *Board of Education v. Allen, supra*. To the contrary, careful analysis of the majority opinion in *Walz* establishes that:

(1) the Court in *Walz* did not displace the *Schempp* test as a primary guide for determining the boundary between permissible government involvement with *secular* activities and impermissible government involvement with *religious* activities; (2) the purpose and effect analysis was applied and found to have been satisfied in *Walz*; (3) this Court's decision in *Board of Education v. Allen, supra*, was expressly approved by the majority in *Walz*; (4) the majority in *Walz* found that houses of religious worship are the legitimate beneficiaries of an affirmative policy of the State that considers them "as beneficial and stabilizing influences in community life," despite the fact that it was not the secular activities of religious organizations which furnished the justification for the tax exemption at issue; and (5) language in *Walz*, in which the appellants and their supporting *amici* purport to take comfort, clearly referred to hypothetical government subsidies to *religious* activities–not to *secular* activities of the type for the assistance of which the Pennsylvania statute now before this Court was enacted.

In the view of these *amici*, what the *Walz* case did was to combine two doctrines that the Court had clearly enunciated in the past: the "secular purpose and primary effect" test of *Schempp* and the no excessive involvement guide. However awkward its application in the tax exemption area, the *Schempp* test clearly remains the formula for determining the constitutionality of a statute, such as Pennsylvania's, enacted in order to assist or improve secular education. That test thus remains as the primary guide or mechanism with the assistance of which the Court must traverse the "tight rope" of which the majority spoke in *Walz*, 397 U.S., at 672.

Analysis of the Pennsylvania statute shows no support for appellants' contention that the implementing administrative provisions of the Pennsylvania Act, under which the State supervises the use of its appropriated funds, constitute an excessive governmental "involvement" or "entanglement" with religion. A host of Federal and State programs, includ-

ing the New York textbook program which was upheld by this Court in *Board of Education v. Allen*, establishes that normal administrative prudence in overseeing a State program which involves expenditures of public funds does not constitute excessive State involvement with religious activities.

As to the danger of "divisiveness" or "fragmentation" to which appellants and their supporting *amici* point with alarm, there are two answers. First, for a number of years there have been in existence many Federal and State programs which have provided financial aid to the secular activities of religious institutions without generating the religious divisiveness about which our adversaries purport to be upset. Secondly, if the future does witness an increase in the amount or intensity of requests for financial assistance to the schools of various religious sects, the Pennsylvania legislature will be there to deal with such pressures, should they arise. Moreover, three years of operation under the Pennsylvania statute have not witnessed any emergence of the "fragmentation" and "divisiveness" which the appellants fear. Should such disturbing tendencies manifest themselves in the future, they "can be dealt with 'while this Court sits.'" 397 U.S., at 678.

ARGUMENT

I

THE FINANCIAL PROBLEMS OF THE NONPUBLIC SCHOOLS ARE PUBLIC PROBLEMS

The continuing and intensifying financial crisis which now afflicts private education in this Country raises serious doubt as to whether those schools can continue to properly perform their "task of secular education." 392 U.S., at 247. That crisis weighs especially heavily on the religious-related, nonpublic school. These schools, for the most part, educate the children not of the affluent, but of the lower and middle income classes of parents. The tuition which such schools can charge has a definite and restricted maxi-

mum level regulated by the modest financial means of the parents from whom such schools draw the great bulk of their students. As their financial predicament worsens, these schools will be required to curtail, and in some cases, to terminate, their secular educational operations, or else secure some form of public financial assistance if they are to continue doing their "*acceptable* job of providing *secular education* to their students." *Ibid.* (Emphasis supplied.)

What is constitutionally important about the financial problems of the parochial schools is that these problems, left unattended, generate a *public* educational crisis. Pennsylvania, it is true, has no stake in the churches that sponsor these schools, but Pennsylvania has an enormous stake in the children that attend them and the parents who freely choose the schools for their children's education. Pennsylvania cannot compel anyone to go to church, but it can and does compel attendance at secularly qualified schools.

If Pennsylvania does not provide some financial assistance to help keep nonpublic schools functioning at quality secular levels, Pennsylvania will have to provide—at enormously greater cost—public schools for most of the children now in church-related schools. By itself, of course, saving money is not a complete constitutional justification for anything. But it must be remembered that for over a hundred years many parents and churches in Pennsylvania have been saving the State money, by providing the secular education of a large percentage of the school children without any tax cost. These parents and churches never were, and are not now, under any legal obligation to continue this saving to the State. As the parents and churches find it more and more difficult to continue their public contributions at the former level, the State must think seriously about how to provide financially for the educational obligation it has always had but only now is being called upon to meet. The financial problems of the nonpublic schools are financial problems for the States, because the

nonpublic schools have been doing a job that the Sta must do if the nonpublic schools stop doing it. The Penns vania Act is that state's recognition of, and response to, own State problem.

More, however, than money is at issue. If Pennsylva does not channel its educational benefits through bo public and nonpublic institutions in a time of rapid increasing costs, Pennsylvania will not reap the benefits a pluralistic educational structure in a pluralistic societ This Court has said that *parents* have the right to choose competent nonpublic school for the education of the children, and that *States* have the right to enact compu sory education laws with reasonable standards of academ exposure and achievement. If both parents and States ha these rights, then the States must also have the right choose a pluralistic structure for their secular education programs. Again, the statute represents a practical dete mination by Pennsylvania for the preservation of th cherished pluralism which furnishes one of the great bu warks of America's unique democracy.

The expanding dimensions of the serious financial crisi which confronts the private religious-related schools ar attributable to causes that are not difficult to identify. Pri mary in its impact, of course, is the precipitous inflationary rise, especially over the last ten years, in the operating costs necessarily incurred in producing the high quality of secular education, both public and private, which American parents demand for their children. However, this inflationary spira has special manifestations and is accentuated by uniquely contributing factors in the private school sector, especially in respect to the religious-related private schools.[6] In that

[6]Nationally, 12% of all American school children attend nonpublic schools. Approximately 90% of these children attend schools affiliated with religious organizations. In the State of Pennsylvania 20% of the school children attend nonpublic schools. In the Pittsburgh metropolitan area 29% of the school children attend nonpublic schools. In the Philadelphia metropolitan area 34% attend nonpublic schools. For further statistics see Brief for Appellee Schools, pp. 11 and S-13.

area, teachers' salaries and related administrative costs doubled in the ten-year period from 1958 to 1968. Since 1968 they have continued to climb at an even higher rate of acceleration. Such increases have had a special impact on the budgets of private schools where, on the average, 70% of the school budget is consumed by operating costs.

Many of the religious-related schools, especially the great majority of Catholic elementary and secondary schools, have had their budgetary problems compounded by another, quite singular phenomenon in recent years. During the same period when teachers' salaries were rising and classes were being decreased in size in order to provide better education, the ratio of religious volunteers to lay teachers experienced a rapid and severe change. Ten years ago three-fourths (3/4) of the teachers in the Catholic school systems of the Country were religious personnel and only one-fourth (1/4) were laymen. Last year, however, approximately 45% of those teachers were lay persons. Unofficial statistics, not yet finally confirmed, indicate that in the school year of 1970-71 just about 50% of the teachers in the Catholic elementary and secondary schools will be lay teachers. Most religious volunteers receive only minimal financial compensation, whereas lay teachers must be paid a salary sufficient for them to support their families and themselves.[7] It is true that these lay teachers, on the average, are receiving compensation for their services which is somewhat below their public school counterparts. Nevertheless, religious-related schools are under a moral obligation to pay their teachers and administrative staff what basic social justice commands. As a consequence, a nearly 100% increase in the number of lay teachers in the Catholic elementary and secondary schools of the Country during the last ten years has placed a tremendous strain on the ability of such schools to continue to provide the secular

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[7]Surely, the decline in the number of persons willing to work for practically nothing is not an exclusively religious phenomenon in America; nor is it a constitutional bar to the States' starting to pay for what they were always obligated.

education which, for so long, they have offered to a significant portion of America's youth.

In the light of these statistics, it is not surprising that the total number of religious-related private schools and the number of students attending them, especially on the elementary school level, have declined significantly in each of the last five years.[8] Moreover, when private school enrollment decreases, there is usually a corresponding *pro tanto* increase, or nearly so, in public school attendance, along with an increase in public school expenditures required to accommodate the influx of new students into already financially overburdened public school systems. In New York, for example, from 1965 to 1970 Catholic school enrollment decreased by a total of 90,726 pupils, of which more than a third (32,202) occurred in the 1969-70 school year. At present, New York annually expends $1,134 per pupil in educating its children in the schools of the State. The profound financial impact of any substantial transfer of pupils formerly attending Catholic schools upon the New York public school system, especially in its large urban areas which already labor under a heavy financial and educational load, is obvious.[9]

Yet, administrators of the nonpublic schools, supported by a strong, continuous demand throughout the Country for the preservation of these schools, have not given up the struggle in the face of the growing financial crisis which has been visited upon their schools. They have employed many measures in an effort to deal with their burgeoning budgets.

[8]For instance, in 1965 there were 10,879 Catholic elementary schools in the United States, at which 4,492,107 pupils were in attendance. In 1969 the number of elementary schools was 10,338, and 3,902,487 pupils attended those schools. Catholic Education Today: An Overview, Office of Public Information, NCEA (1969).

[9]Estimates of School Statistics 1969-70, NCEA (1970); Estimates of School Statistics 1969-70, copyrighted 1969 by the National Education Association. The increase attributable to the enrollment in New York public schools in 1969-70 of students who formerly attended Catholic schools has been estimated to be over one hundred million dollars ($100,000,000) for the 1969-70 school year. *Ibid.*

They have raised tuition to the limits of the parents' ability to pay, an ability that has definite marked limitations, which, in the majority of cases, have now been reached. They have consolidated and eliminated grades. They have reduced non-essential activities to a minimum. They have solicited the private sector for contributions. They have sought, and in some instances have received, some assistance under Federal and State aid programs. Finally, and most unfortunately, in some cases, and with increasing frequency, nonpublic schools have been closed.

Very few nonpublic schools have been able to maintain a balance between tuition income and the rising costs of education. Religious-related nonpublic schools almost without exception receive financial support in very large measure from the church congregations. In some cases tuition charges represent only a nominal portion of the entire costs of school operations. Unfortunately, the ability of the representative churches to continue to finance schools solely on the basis of tuition and contributions is now subject to serious challenge. It is clear that the parents of students who attend such schools are already overburdened with tuition and other obligations. Many cannot afford even the level of tuition that is now charged, much less being able to meet the tuition that would have to be charged if the schools were to be placed on a "tuition equals expenses" basis.

This, then, is the pressing public problem at which the Pennsylvania Act is directed. Its dimensions are large; and the justifiable concern of the public's legislative representatives in ameliorating it is not open to argument. *Amici* next show in the remaining portions of their brief that the means chosen by the legislature to solve this public problem coordinate the rights of parents and State, enhance academic freedom, and are in accord with the prior controlling decisions of this Court in the field of State and Church constitutional law.

II

THE PENNSYLVANIA STATUTE IS AN EFFECTIVE COORDINATION OF PARENTAL AND STATE RIGHTS IN THE SECULAR EDUCATION OF CHILDREN.

Numerous decisions of this Court have established three basic propositions of constitutional law:

(1) States have the right to enact compulsory education laws that set reasonable standards for the secular education of all children of school age;[10]

(2) States have the right to spend public funds for the secular education of all school children;[11] and

(3) Parents have the right to select private nonsectarian or religiously affiliated schools that meet the secular standards of the compulsory education laws.[12]

The Pennsylvania statute now before this Court is obviously in harmony with these three basic propositions. The statute effectively coordinates parental and State rights in the secular education of school children. State standards of secular academic exposure and achievement are set; State funds are provided to meet part of the cost of secular education; and parents are left free to select either public schools or private schools for the education of their children.

Appellants would destroy this coordination of parental and State rights by having the Court hold that the exercise of one constitutional right (sending a child to a secularly qualified parochial school) forfeits another constitutional

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[10] *Meyer v. State of Nebraska*, 262 U.S. 390 (1923); *Epperson v. State of Arkansas*, 393 U.S. 97 (1968); *Tinker v. Des Moines Ind. Comm. School District*, 393 U.S. 503 (1969).

[11] *Cochran v. Louisiana State Bd. of Education*, 281 U.S. 370 (1930); *Everson v. Board of Education*, 330 U.S. 1 (1947); *Board of Education v. Allen*, 392 U.S. 236 (1968).

[12] *Pierce v. Society of Sisters* and *Pierce v. Hill Military Academy*, 268 U.S. 510 (1925).

right (participation in general benefits of a secular character that the State has decided to accord its citizens). Such a doctrine of forfeiture, however, is without foundation in our constitutional and academic traditions. Indeed, in recent years, this Court has made it quite clear that the States and the Federal Government cannot condition the exercise of one constitutional right upon the surrender of another.[13]

Appellants, of course, contend that a constitutional right to do something is not a constitutional right to do it at public expense. This argument misses the point. First of all, although one is free to worship or not as he judges right in his own conscience, one is not free to send or not send his child to school. The State has the right to compel school attendance, and therefore the State has the right to facilitate school attendance. Since the State cannot mandate attendance for all children at public schools, the State must have the right to facilitate attendance by children, for secular educational purposes, at both public and nonpublic schools.

Secondly, *amici* are not arguing that the State of Pennsylvania, or any other State, is under a constitutional obligation to enact the present statute. *Amici* are arguing only that the State of Pennsylvania has the right to do so in order to achieve its goals of high-quality secular education for all school children and in order to achieve a more effective coordination of parental and State rights in the secular education of school children.

The Pennsylvania statute is typical of a trend that has developed at both the Federal and State level since World

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[13]See, for example, *Simmons v. United States*, 390 U.S. 377, 393-94 (1968) and *United States v. Jackson*, 390 U.S. 570, 581-82 (1968). See also *Keyishian v. Board of Regents*, 385 U.S. 589, 605-6 (1967) for a definitive exposition of the doctrine that eligibility for participation in governmental "privileges" cannot be conditioned upon the surrender of constitutional rights.

War II and especially during the last decade. The Federal Government has enacted a number of statutes providing assistance for secular education in both public and nonpublic schools,[14] and many State governments have followed suit.[15]

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[14]Among the most important Federal programs providing secular assistance at the elementary and secondary level are the following: National School Lunch Act of 1946, 42 U.S.C. §§ 1651 ff.; Federal Property and Administrative Services Act (Surplus Property) of 1949, as amended, P.L. 78-457, P.L. 81-152; National Defense Education Act of 1958, 20 U.S.C. §§ 15 ff.; Manpower Development and Training Act of 1962, 42 U.S.C. §§ 2571 ff.; Educational Television Act of 1962, 47 U.S.C. §§ 390 ff.; Economic Opportunity Act of 1964, 42 U.S.C. §§ 2701 ff.; and the Elementary and Secondary Education Act of 1965, 20 U.S.C. §§ 236 ff.

On the collegiate and university level, Congress has repeatedly evinced the same legislative judgment that secular educational assistance should be provided to both public and nonpublic institutions. The following statutes are particularly noteworthy: National Science Foundation Act of 1950, 42 U.S.C. §§ 1861 ff.; College Housing Amendments of 1955, 12 U.S.C. § 1749; Higher Education Facilities Act of 1963, 20 U.S.C. §§ 701 ff.; Higher Education Act of 1965, 20 U.S.C. §§ 403 ff.; National Foundation on the Arts and Humanities Act of 1965, 20 U.S.C. §§ 784 ff.; Education Professions Development Act of 1967, 20 U.S.C. §§ 1091 ff.; Library Services and Construction Amendments of 1967, 20 U.S.C. §§ 355, 358.

For a comprehensive list of Federal educational programs currently in force, see the index in Catalog of Federal Domestic Assistance (OEO; Jan. 1969) s.v. "Education" and "Educational . . ."

[15]Twenty-three States currently provide transportation services for children attending secularly qualified nonpublic schools: California, Connecticut, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, and West Virginia. Other areas in which the States have extended assistance to both public and nonpublic schools include health services (*e.g.*, Connecticut, New Hampshire, New York and Pennsylvania), textbooks (Connecticut, Indiana, Louisiana, Michigan, Mississippi, New Mexico, New York, Ohio, and Rhode Island), and driver education (Connecticut, Ohio, and Pennsylvania).

Far more important, however, than statutes dealing with transportation, textbooks, health services, and driver education are the State

This trend represents a definite evolution in American educational policy. Prior to the Civil War, there were no public schools to speak of and such public assistance as was given to education was channeled through private organizations. With the rise of the public school movement after the Civil War, valid economic, administrative and other policy considerations led most States to channel educational benefits only through public schools (although tax exemptions and certain public services were maintained for nonpublic schools). Now, in the modern period, with the tremendous demand for equalization and improvement of secular educational opportunities, the Federal and many State governments have embarked upon a policy of providing secular educational assistance for all children in secularly qualified schools.

Appellants seek to prevent this legislative choice of educational policy on strictly religious grounds. In the process they destroy parental and State rights that do not depend upon religion for their existence.

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programs that, like Pennsylvania's in the instant case, demonstrate the gravity of the State legislative judgments that assistance to secular education in nonpublic as well as public schools is both necessary and desirable. Pennsylvania enacted its statute in 1968. In 1969, Connecticut and Rhode Island enacted, respectively, the Non-Public School Secular Education Act (Public Act 791) and the Teachers Salary Supplement Act (R.I. Gen. Laws Ann. § 15-51-3). In the same year, Ohio enacted the Supplementary Education Services Act (Ohio Rev. Code § 3317.06(H). In 1970, three more States with large numbers of children in nonpublic schools passed basic assistance legislation: Louisiana, Michigan and New York (Louisiana Secular Educational Services Act, Act 223, 1970 Rev. Stat.; Michigan Teachers Salary Supplement Act, Mich. Stat. Ann. § 15.1919; and New York Mandated Services Act, Laws of 1970, ch. 138).

The trend is clear: the State legislatures know that a public educational problem exists and that something must be done about it. To see in this mass of legislative activity, as some of the appellants and other *amici* do, nothing more than a thinly veiled attempt to establish religion (Roman Catholic or otherwise) is, to say the least, politically and educationally myopic.

There is nothing in American constitutional law that requires States to channel all their educational programs through public schools. Both States and parents are entitled to something better than an "all or nothing" choice. Whatever restrictions the No Establishment and Free Exercise Clauses impose on State action in the educational area, they do not canonize the public school as the only constitutional instrumentality of secular education.

States are free to make public schools available to all those who desire a public school type of education. The States are also free to devise alternative and limited forms of secular educational assistance for those who find the public school system too narrow or too broad, too orthodox or unorthodox a structure and atmosphere for the kind of upbringing they have chosen for their children. In devising these alternatives to the public school system, States must, of course, comply with the Fourteenth Amendment and other relevant sections of the Federal Constitution. That such compliance is possible has already been demonstrated by the decisions of this Court in *Everson v. Board of Education, supra,* and *Board of Education v. Allen, supra.* That such compliance is also present in the Pennsylvania statute now before this Court will be evident from an analysis of it in the light of *Abington School District v. Schempp*, 374 U.S. 203 (1963) and *Walz v. Tax Commission*, 397 U.S. 664 (1970), *infra,* pp. 29-39.

III

THE PENNSYLVANIA STATUTE IS AN IMPORTANT ENHANCEMENT OF ACADEMIC FREEDOM

Before proceeding, however, to the *Schempp* and *Walz* analysis, *amici* wish to emphasize another important, but perhaps less immediately apparent, facet of the Pennsylvania statute. In addition to coordinating the rights of parents and of the States, the Pennsylvania program lends strong support to one of the most fundamental values in American constitutional law: the free exchange of ideas in the marketplace, and especially in the academic marketplace.

Mr. Justice Holmes first judicially formulated this transcendent value in his famous dissent in *Abrams v. United States*:

> But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.[16]

During the fifty years since Holmes penned his memorable dissent, this Court has fully adopted the marketplace principle and has made it the basis of scores of landmark cases dealing with freedom of thought and of speech, freedom of association, and freedom of religion. In no area, however, has the Court been more insistent on the application of this principle than in the area of academic freedom. As the Court said quite recently in *Keyishian v. Board of Regents*:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton v. Tucker*, 364 U.S., at 487. The classroom is peculiarly the "marketplace of ideas."[17]

In recent years this Court has relied increasingly upon the First Amendment as the guarantee of academic freedom. It is worth noting, however, that even before the First Amendment was applied to the States through the Fourteenth, this

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[16] 250 U.S. 616, 630 (1919).

[17] 385 U.S., at 603.

Court declared that the Fourteenth, of and by itself, protected academic freedom. As Mr. Justice McReynolds explained for the Court in one of the first cases applying the Fourteenth Amendment to educational legislation, the word "liberty" in the Due Process Clause includes a wide range of freedoms, including the right to teach and learn.[18] "The American people," he said, "have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted."[19] The same fundamental proposition has been emphasized repeatedly by this Court in First and Fourteenth Amendment cases in the last two decades.[20]

It is settled, then, that the free exchange of ideas is essential to the vitality of the Nation, and that academic freedom is essential to the free exchange of ideas. On the strength of these propositions, this Court has defended academic freedom "in the community of American schools," both in the colleges and universities[21] and in high schools and grammar schools.[22] It does not matter whether these institutions be public or private: teachers and administrators, parents and students enjoy that freedom to learn and to teach without which America cannot survive as a free nation.

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[18] *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923).

[19] *Id.* at 400.

[20] See, for example, *Brown v. Board of Education*, 347 U.S. 483, 493 (1954); *Board of Education v. Allen*, 392 U.S. 236, 247-48 (1968).

[21] *Wieman v. Updegraff*, 344 U.S. 183 (1952); *Slochower v. Board of Higher Education*, 350 U.S. 551 (1956); *Sweezy v. New Hampshire*, 354 U.S. 234 (1957); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Whitehill v. Elkins*, 389 U.S. 54 (1967).

[22] *Meyer v. Nebraska*, 262 U.S. 390 (1923); *West Virginia State Bd. of Education v. Barnette*, 319 U.S. 624 (1943); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Pickering v. Board of Education*, 391 U.S. 563 (1968); *Epperson v. Arkansas*, 393 U.S. 97 (1968); *Tinker v. Des Moines Ind. Comm. School Dist.*, 393 U.S. 503 (1969).

Moreover, this Court has long since recognized that the nonpublic schools of America play a critical role in the preservation and development of academic freedom. There can be no true freedom where there is no real diversity. In 1925, confronted with a statute that, in the name of promoting American unity, would have destroyed the nonpublic schools, this Court said:

> The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.[23]

In *Board of Education v. Allen*, Mr. Justice White, speaking for the Court, advanced two "corollaries" of the *Pierce* decision: the right of the States to regulate secular education in the nonpublic schools, and the right of the States to facilitate such education through carefully limited programs of secular assistance.[24] It is time now for the Court to reaffirm unmistakably the harmony of the *Pierce-Hill* decision and its corollaries with the highest traditions of American academic freedom. The Pennsylvania statute, as an implementation of one of those corollaries, is not only not an establishment of religion; it is an important enhancement of academic freedom.

Without nonpublic schools, and without quality secular education in those schools, the Nation would be enormously poorer in its educational resources and therefore in the

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[23] *Pierce v. Society of Sisters* and *Pierce v. Hill Military Academy*, 268 U.S. 510, 535 (1925). As many commentators have pointed out, the reasoning of this decision rests solidly on Fourteenth Amendment parental and educational rights, not on the free exercise of religion.

[24] 392 U.S., at 246-247.

dynamism of its marketplace of truth. This is immediately apparent at the college and university level: Take away the great private colleges and universities like Harvard, Columbia, Notre Dame and Southern Methodist, and you have impoverished the Nation. Although perhaps less obvious at the grammar and high school level, it will not take much reflection to perceive that a similar impoverishment would occur if the nonpublic elementary and secondary schools of the country were to substantially dwindle in variety and number or to degenerate in the quality of their secular education.

What is it that has kept American private educational institutions alive, especially at the elementary and secondary level? It is, in part, the conviction that the study of religion and the formation of religious habits are indispensable parts of any sound educational process. But it is also, and very importantly so, the conviction that public schools, precisely because they are governmental schools, operate under certain unavoidable academic liabilities, especially the constant pressure of the currently dominant political opinion and the intrinsic tendency of any political organization towards bureaucracy.

The reality of the danger from political pressures needs no demonstration to this Court. The increasing frequency with which this Court has been called upon to decide academic freedom cases is well known to all its members. If there were no serious and pernicious political pressures, the decisions from *Meyer* to *Tinker* would never have been rendered.[25]

The danger from bureaucracy is no less real. Public schools are governmental schools, and governments are–or become–bureaucracies. As already noted, States have the right to set reasonable secular standards for all schools, public and nonpublic; but States have to operate public schools, and the volume of public school legislation grows every year. This is an unavoidable price that Americans

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[25] See citations in note 22, *supra*.

willingly pay for the enormous benefits derived from the public schools; but in recent years it has become apparent that many public school systems suffer in their capacity for originality, innovation and experimentation. Some problems drag on for years and years, not only because the political will to cure them is lacking, but because there is not enough academic stamina to survive the red tape.

Nonpublic schools, of course, are no paradise. They too suffer, all too frequently, from organizational tendencies to bureaucracy and from conservatism. As a group, however, nonpublic schools, precisely because they are less subject to regulation than their public counterparts, have greater opportunities for experimentation and innovation. That is why nonpublic schools do not want total governmental assistance; for they are well aware that with more assistance comes more regulation. Partial governmental assistance makes it possible for nonpublic schools to maintain quality secular education without losing their greater capacity for change and experimentation.

Nonpublic schools also provide a different frame of intellectual and moral discourse than that permitted in the public schools. As a result of this Court's decisions in *McCollum*, *Engel* and *Schempp*,[26] it is evident that public schools can "teach about" religion, but that they may not make religion an integral part of the school atmosphere and orientation. This limitation on the capacity of the public schools to relate to the central values of human life derives from the First and Fourteenth Amendments, which forbid the Federal and State governments to espouse any religion in the public schools.

It is the conviction of many Americans that an educational system that does not take religion seriously *on the academic level* is an educational system that has closed itself,

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[26] *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203 (1948); *Engel v. Vitale*, 370 U.S. 421 (1962); *School District v. Schempp*, 374 U.S. 203 (1963).

at least in substantial measure, to a vital dimension of human experience and human truth. At the very least, a nation in which such a system educates most of the youth needs a supplementary system to preserve its openness to the total marketplace of human ideas. Anyone who takes that marketplace seriously knows that it must not become a government store. Pennsylvania's statute seeks to avoid that intellectual dead-end, without embroiling the State in religious affairs or subsidizing religious formation, by a carefully designed program of secular assistance for quality secular education.

There are some, of course, who would deny that church-related schools provide secular education at all. For them, secular education is not secular education when religion has been added. They see religion, especially organized religion, as an intransigent foe of academic freedom, of the human search for truth, and of the very concept of a marketplace of ideas.

Fortunately, this Court has already clearly rejected this caricature of religion and the church-related school. In *Board of Education v. Allen, supra*, the dual function of the secularly qualified church-related school was clearly perceived and defined.

A school is a school, not a church. A school does not lose the character of a school by virtue of teaching moral principles and religious beliefs. Certainly, denominational schools and particular churches bear relations to one another. But relationship and substantive identity are very different. The point was well made over sixty years ago by the then Solicitor General of the United States, Henry Martyn Hoyt, in the argument he presented to the Court in *Quick Bear v. Leupp.*[27] The Solicitor General said:

> The Constitution provides that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." A religious

[27] 210 U.S. 50 (1908).

> establishment, however, is not synonymous with an establishment of religion. See Bradfield v. Roberts, 175 U.S. 291, upholding an appropriation for a Roman Catholic hospital. A school, like a hospital, is neither an establishment of religion nor a religious establishment, although along with secular education there might be, as there commonly is, instruction in morality and religion, just as in a hospital there would be religious ministrations.[28]

Important, however, as nonpublic schools are to academic freedom and the marketplace of ideas in the United States, State programs that seek to preserve and improve the quality of secular education in such schools must satisfy the requirements of the Fourteenth Amendment with respect to the relationships that such programs create between Church and State. *Amici*, accordingly, will conclude their argument by showing that the Pennsylvania program is fully in accord with Fourteenth Amendment requirements, as elaborated by this Court in *School District v. Schempp* and *Walz v. Tax Commission.*

IV

THE PENNSYLVANIA STATUTE SATISFIES THE *SCHEMPP* TEST AND IS IN ACCORD WITH BOTH THE RESULT AND RATIONALE IN *WALZ.*

This case was decided in the court below prior to the announcement of the decision of this Court in *Walz v. Tax Commission*, 397 U.S. 664 (1970), and the Court's opinion in *Walz* thus was not available to the lower court for guidance in reaching its decision. The appellants now argue that this Court's decision in *Walz* argues against the constitutionality of the Pennsylvania statute challenged in this litigation.[29] Several of the *amici* supporting the appellants

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[28]Brief of the Solicitor General, No. 569, October Term, 1907, p. 74.

[29]Brief for Appellants, pp. 17, 18, 42 and 43.

make the same contention.[30] And a three-judge federal court for the District of Rhode Island, in holding unconstitutional a statute which provided for the payment of state funds to teachers of secular subjects in nonpublic elementary schools, appears to have adopted such a view of the *Walz* decision. *DiCenso v. Robinson, et al.*, ____ F. Supp. ____, (D. R.I., 1970).[31] The contention that the Court's decision in *Walz* requires a finding of unconstitutionality in this case is based on the assumption that in *Walz* this Court displaced the test it enunciated in *Abington School District v. Schempp*, 374 U.S. 203, 222 (1963), and followed in *Board of Education v. Allen, supra*; *i.e.*, "that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion." As put in its strongest terms by one of the *amici curiae* supporting the appellant, this argument is that "the *Schempp* test has been superseded by *Walz*", this Court in the latter case "having studiously avoided application of the *Schempp* test", and having stated the second half of that test not in terms of "effect", but in terms of "entanglement".

With all respect to the appellants, *Walz* holds the very opposite. It is our contention that: (1) the Court in *Walz* did not displace the *Schempp* test as a primary guide for determining the boundary between permissible government involvement with *secular* activities and impermissible government involvement with *religious* activities; (2) the purpose and effect test, first enunciated by the Court in the *Schempp* case, was found to have been satisfied in *Walz*; (3) this Court's decision in *Board of Education v. Allen*,

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[30]Brief of Protestants and Other Americans United for Separation of Church and State, *Amicus Curiae*, p. 18; Brief of the American Association of School Administrators, *et al.*, *Amici Curiae*, pp. 30-37; Brief of American Jewish Committee, *et al.*, *Amici Curiae*, pp. 21-25.

[31]On June 27, 1970, this Court stayed the operative effect of the lower court's ruling in *DiCenso*.

supra, was expressly approved by the majority in *Walz*; (4) the majority in *Walz* found that houses of religious worship are the legitimate beneficiaries of an affirmative policy of the State that considers them "as beneficial and stabilizing influences in community life", despite the fact that it was not the secular activities of religious organizations which furnished the justification for the tax exemption at issue; and (5) language in *Walz* in which the appellants and their supporting *amici* purport to take comfort clearly referred to hypothetical government subsidies to *religious* activities--not to *secular* activities of the type for the assistance of which the Pennsylvania statute now before this Court was enacted. Mr. Chief Justice Burger wrote for the majority in *Walz*. Analysis of his opinion confirms these conclusions concerning its construction and effect.

At the outset, the Chief Justice defines Establishment of Religion, as understood by the framers of the First Amendment, to connote "sponsorship, financial support and active involvement of the sovereign in *religious activity*." (Emphasis supplied.) 397 U.S., at 668. That definition squares with the decisions which this Court has handed down in the Church and State field. Thus, for example, prayers in the public schools have been prohibited because that would be sponsoring religious activity. *School District of Abington Township v. Schempp, supra*. Direct grants in support of religious activity likewise would violate the First Amendment. *Everson v. Board of Education*, 330 U.S., at 16-17: see also *Flast v. Cohen*, 392 U.S. 83, 98, n. 17 (1968). And state involvement in doctrinal religious disputes would also be condemned as impermissible involvement of the sovereign in religious activity. *Maryland and Virginia Eldership of the Churches of God v. Church of God at Sharpsburg, Inc.*, 396 U.S. 367, 368-370 (1970) (Brennan, J. *concurring*). In each instance, however, the government action offensive to the First Amendment is action directed toward or involved with "religious activity".

After defining the government actions which are embraced within the prohibitions of the Establishment Clause, the majority in *Walz* make clear that the purpose of the Religion Clauses of the First Amendment was "to state an objective, not to write a statute". 397 U.S., at 668. The majority then notes that what seemingly might appear to be "considerable internal inconsistency in the opinions of the Court" in the Church-State field "derives from what, in retrospect, may have been too sweeping utterances on aspects of these clauses that seemed clear in relation to the particular cases but have limited meaning as general principles." Among these, the Court in *Walz* specifically singles out the "no aid" *dicta* appearing in the majority opinion in *Everson.*[32] 397 U.S., at 670.

At this point, the Chief Justice pauses to approve of the results reached both in *Everson* and in *Board of Education v. Allen, supra.* As to the bus transportation payments to parents of children in religious-related schools which were upheld in *Everson*, the *Walz* opinion acknowledges that such public programs "to pupils who receive religious instruction 'aid' that particular religion to maintain schools that plainly tend to assure future adherents to a particular faith by having control of their total education at an early age." "Similarly," said the Chief Justice:

> "... making textbooks available to pupils in parochial schools in common with public schools was surely an 'aid' to the sponsoring churches because it relieved those churches of an enormous aggregate cost for those books. Supplying of costly teaching materials was not seen either as manifesting a legislative purpose to aid or as having a primary effect of aid contravening the First Amendment [citing *Board of Education v. Allen*]."[33]

In reaffirming the results which it had reached in *Everson* and in *Allen*, the majority's opinion in *Walz* acknowledges

[32] 330 U.S., at 15.

[33] 397 U.S., at 671-72.

that there are "risks inherent in programs that bring about administrative relationships between public education bodies and church-sponsored schools, . . ." Nevertheless, the Court has "been able to chart a course that preserved the autonomy and freedom of religious bodies while avoiding any semblance of established religion." The charting of this course, said the Chief Justice, is a " 'tight rope' and one we have successfully traversed." 397 U.S., at 672.

Up to this juncture, there is nothing in the majority opinion in *Walz* which can be construed as either a modification or repudiation of the *Schempp* test or a disavowal of the *Allen* holding in which the *Schempp* test was expressly applied for the first time to a governmental program assisting the secular education activities of a religious-related school and where the state aid provided was of "an enormous aggregate cost"[34] and where also were involved administrative procedures established in order to insure that New York's textbook program was carried out in accordance with the statute.

The majority in *Walz* then concluded that the legislative "purpose" of the New York property tax exemption constituted "neither the advancement nor the inhibition of religion; . . ." Specifically, they stated that houses of worship fell within a broad class of property owned by nonprofit, quasi-public corporations and were entitled to be the beneficiaries of "an affirmative policy" of the State of New York "that considers these groups as beneficial and stabilizing influences in community life, . . ." 397 U.S., at 673. If a house of worship, which is concerned primarily, if not in many cases exclusively, with the conduct of "religious activities" may be the beneficiary of "an affirmative policy" of the State, *a fortiori* a religious-related school which performs secular educational services or activities can also qualify for state assistance that runs only to those secular functions or activities, but not to the religious activities of

[34] *Ibid.*

either the school itself or the religious group or organization with which the school is affiliated.

Having found that the New York property tax exemption law had its origins in a legislative purpose that was secular and not religious, the majority opinion next turns to the question of the "effect" of the New York statute, a determination in which the Court had to assure itself "that the end result—the effect—is not an excessive government entanglement with religion." 397 U.S., at 674. These *amici* understand the Court's decision in *Walz* of this issue clearly to have followed the purpose and effect analysis of the *Schempp* test.

However, it is true that the *Schempp* test "is not easy to apply", as this Court frankly acknowledged in the *Allen* case.[35] This is especially so in the case of tax exemptions for religious property or activities. In that area, taxation unavoidably "hurts" and exemption unavoidably "helps" religion. In such circumstances, where the effects on religion are immediate, substantial and necessarily either helpful or hurtful, the guidelines provided by the *Schempp* test are obviously more difficult to apply. Nevertheless, a majority of the Court in *Walz* was able to find that the "effect" of the religious tax exemptions involved did not constitute government sponsorship of religion within the prohibitions of the Establishment Clause, since there was no "excessive government entanglement" or "involvement of the sovereign in religious activity." The *Walz* emphasis on avoiding such entanglement and involvements was clearly foreshadowed in this Court's pronouncements on the constitutional guidelines for judicial settlement of church property disputes. See *Maryland and Virginia Eldership of the Churches of God v. Church of God at Sharpsburg, Inc.*, 396 U.S., at 368-70 (Brennan, J. *concurring*); *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Church*, 393 U.S. 440 (1969), and cases cited therein.

[35] 392 U.S., at 243.

In short, what the *Walz* case did was to combine two doctrines that the Court had clearly enunciated in the past: the secular purpose and primary effect test of *Schempp*, and the no excessive involvement guide.

Whatever the difficulties of applying the *Schempp* test to religious tax exemptions, that difficulty is not present in the instant case. Indeed, it is reasonable to assume, we believe, that the *Schempp* test was specially designed to govern situations, such as that now before the Court for review, in which the government asserts a secular justification for affirmative public activities and expenditures affecting religious-related institutions, such as schools and hospitals. As such, the test serves well in drawing a clean line between *forbidden* use by government of religious means for secular ends and *permissible* use by government of secular means, to take this case, for the improvement of secular education of all school children, regardless of the secular or the religio-secular character of the school they attend. Thus, it is fair to say that the *Schempp* test, whose application in the religious tax exemption area is somewhat awkward, clearly remains the formula for determining the constitutionality of a statute, such as Pennsylvania's, enacted in order to assist or improve secular education. In the field of public expenditures, the *Schempp* test is the primary guide or mechanism with the assistance of which the Court has walked, and shall continue to traverse, the "tight rope" of which the Chief Justice spoke in *Walz*.

However, the appellants and their supporting *amici* cite a language in the *Walz* opinion which, they claim, bolsters their contention that the Pennsylvania statute is an "excessive" and, therefore, unconstitutional "involvement" with religion under the *Schempp*, *Walz* or any other test of the reach of the Establishment Clause. The language reads:

> "Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relation-

> ships for enforcement of statutory or administrative standards, . . ."[36]

The language on which they rely cannot carry the argument in whose cause it is offered. The words occur in a paragraph in which the majority opinion is comparing the grant of "tax exemptions to churches", as opposed to taxing churches or granting subsidies to churches or religious *activities.*[37] There is no dispute that the government would be barred by the First Amendment from subsidizing churches, *qua* churches, for it then would be either sponsoring, supporting, or involved with, "religious activity". 397 U.S., at 668. As Mr. Justice Brennan stated it in his concurring opinion in *Walz:* "General subsidies of religious activities would, of course, constitute impermissible state involvement with religion."[38] And in his concurring opinion Mr. Justice Harlan also adverted to the distinction between secular and religious activities, saying:

> "To the extent that *religious institutions* sponsor the *secular activities* that this legislation is designed to promote, it is consistent with neutrality to grant them an exemption just as other organizations devoting resources to these projects receive exemptions." (Emphasis supplied).[39]

Thus, these *amici* read the *Walz* decision as (1) preserving the fundamental distinction between affirmative programs of governmental aid which are directed toward assisting secular activities and those which aid, or involve the government with, religious activities, and (2) also preserving the *Schempp* test as the primary formula or guide for determining on which side of the constitutional line a particular statute or governmental programs falls. However, the appellants and their

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[36] 397 U.S., at 675.

[37] Emphasis supplied.

[38] 397 U.S., at 690.

[39] 397 U.S., at 697.

supporting *amici* make the further argument that even if its purpose and primary effect were to aid secular education, the Pennsylvania statute still must fail because it requires "excessive" governmental "involvement" or "entanglement" in religion, arising out of the administrative provisions of the statute under which the State government polices or supervises the manner in which its appropriated funds are dealt with under the purchase of services program.

Surely, it is not unusual for the government in sponsoring programs in which private organizations, including religious-related schools or hospitals, for example, participate, to make provision for statutory and administrative standards that must be observed for the protection of the state and its taxpayers. In *Board of Education v. Allen*, for instance, the Court was aware that there were implementing procedures governing the distribution of state purchased textbooks to pupils in nonpublic, including religious-related, schools.[40] There was no suggestion in this Court's opinion in *Board of Education v. Allen* that normal administrative prudence in overseeing a state program involving expenditure of public funds results in unconstitutionally involving the State of New York with any religious activities of the parochial schools of the State or of the religious organizations with which those schools were affiliated. So, too, here, the State of Pennsylvania cannot be held to have involved itself excessively with any religious activities, either of the nonpublic schools or of the churches with which they are affiliated.[41]

Finally, it is appellants' concern, and that of their supporting *amici*, that in the future the Pennsylvania statute may invite bitter competition on the part of religious sects to secure the type of assistance provided by the statute and that this in turn will lead to the "fragmentation" of the

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392 U.S., at 244, n.6.

Moreover, it should be noted that, apart from Act 109, Pennsylvania has enacted extensive regulations of secular education in its nonpublic schools. See Brief for Appellee Schools, pp. S. 35-42.

American body politic which the Religion Clauses of th First Amendment were designed to prevent. There ar two answers to that contention. First, as the appellees hav pointed out in their brief,[42] for many years there has bee in existence a great number of Federal[43] and State program which have provided financial aid to the secular activitie of religious institutions, such as schools, hospitals, orphan ages, homes for the aged, *etc.* Yet, there has not occurre in this Nation the religious divisiveness which the appellant claim they fear.

Secondly, if the future does produce an increase in the amount or in the intensity of supplications from various religious sects that wish either to expand their present schools or to establish new school systems, the Pennsylvania legislature will be there to deal with such pressures should they arise. The argument that programs of governmental assistance clearly within a legislature's power to approve must be set aside because the future may witness pressure from religious groups to expand the scope or increase the amount of such programs is not one of constitutional law, whatever its status as *in terrorem* rhetoric. "[A]larms, however, are not arguments", *United States v. Ohio Oil Co.*, 234 U.S. 548, 575 (1914); and to "push propositions to the extremes to which they . . . [might theoretically] lead is often an unsafe guide" in constitutional adjudication. *Northern Securities Co. v. United States*, 193 U.S. 197, 397 (1904); *United States v. Raines*, 362 U.S. 17, 21 (1960). Despite the passage of the Pennsylvania statute, the citizens and taxpayers of the Commonwealth, through their elected representatives, retain the power and the means to deal effectively with any abuses in the form of over-reaching on the part of non-public schools which might occur in the future. Moreover, three years of operation under the statute have not

[42] Brief for Appellee Schools, pp. 47-49.

[43] Some 84 such programs are listed in Supplement B attached to the brief filed by the named school appellees in this case. The programs enacted since World War II are listed herein at n. 15, *supra*.

witnessed any emergence of the "fragmentation" and "divisiveness" about which appellants purport to be alarmed. Finally, should such disturbing tendencies manifest themselves in the future, they "can be dealt with 'while this Court sits.'" 397 U.S., at 678.

The appellants' particular concerns on this point, therefore, are merely that; they do not rise to the level of a constitutional argument sufficient to denigrate the basic, and, we believe, undisputed propositions on which this case should turn, *i.e.:* (1) that non-public schools, including those affiliated with religious institutions, perform very valuable secular educational services; (2) that it is in the interests of the citizens and taxpayers of Pennsylvania that these secular services continue to be furnished by such schools; and (3) that the statute which the Pennsylvania legislature has enacted, both in purpose and in primary effect, is aimed at insuring the continued performance of those secular educational services without any undue involvement of the State with religious affairs.

For the reasons stated above, this Court's opinion in *Walz v. Tax Commission, supra,* in no way can be construed to effect a repudiation of the *Schempp* test. Rather, it applied that test to the facts before it, reaffirmed *Board of Education v. Allen,* and thus preserved both the test and its application in *Allen* as the basis for decision in future cases, including this one. Applied here, *amici* respectfully say, it sustains the constitutionality of the Pennsylvania act.

CONCLUSION

For the reasons stated in this brief, these *amici* urge that the Court affirm the decision of the court below.

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